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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/677,399	10/01/2003	David V. Smith	HM-87423	8881

24982 7590 12/17/2004

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EXAMINER

SWIATEK, ROBERT P

ART UNIT	PAPER NUMBER
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3643

DATE MAILED: 12/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/677,399

Applicant(s)

SMITH ET AL.

Examiner

Robert P. Swiatek

Art Unit

3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 August 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 27-46 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 27-31, 34-39 and 42-46 is/are rejected.
- 7) ☒ Claim(s) 32, 33, 40 and 41 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 01 October 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 27-31, 34, 35, 38, 39, 42 are rejected under 35 U.S.C. 102(b) as being anticipated by Applegate et al. (US 2,778,140). The patent to Applegate et al. discloses an aquatic animal controlling device (Figure 9 embodiment) including first and second, spaced arrays of electrodes 188, 190 mounted in a stream bed. Electrode array 188 is upstream of array 190 by a distance of four to 20 feet (column 7, lines 60, 61, of Applegate et al.). Both arrays are connected to a transformer 36 such that a voltage gradient of a predetermined magnitude—perhaps two volts per inch or greater—is induced between the rows (see column 9, lines 45-48, of Applegate et al.). Individual electrode structure is such that a conductive portion 154 surrounds a non-conductive portion 156, considered to be part of the support elements 158, 160 mounting the electrode in the stream bed. As to claim 42, electrode arrays 188, 190 are considered to be in front of water discharge screens 56, 74 of Applegate et al.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 36, 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Applegate et al. Although electrode arrays 188, 190 of Applegate et al. are arranged obliquely across a stream 10, it would have been obvious to one skilled in the art to orient them perpendicularly to the water flow, in order to minimize the number of electrodes and associated elements by spanning a shorter distance.

Claims 43-46 are rejected under 35 U.S.C. 102(b) as being anticipated by Applegate et al. As described in column 4, lines 65-69, of Applegate et al., motion of fish in a stream is controlled by, *inter alia*, by providing a voltage between first arrays 22, 24 of electrodes that is half the magnitude of that supplied between second electrode arrays 20, 22. Thus, an "incremental field" is produced between the various rows.


Claims 32, 33, 40, 41 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Applicants' arguments with respect to claims 27-31, 34-39, 42-46 have been considered but are moot in view of the new ground(s) of rejection.

The patent to Volz (US 2,991,421) has been cited to provide an additional example of a fish guidance device.

Summary: Claims 1-26, 47 have been cancelled; claims 27-31, 34-39, 42-46 have been rejected; claims 32, 33, 40, 41 have been objected to.

RPS: 0703/308-2700  
13 December 2004

  
ROBERT P. SWIATEK  
PRIMARY EXAMINER  
ART UNIT ~~333~~ 3643